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LITIGATION

Anonymity in cyberspace: courts shield speech but not piracy

By Andrew J. Thomas

Few disagree that noncommercial speech on the Internet is fully protected by the First Amendment, or that the First Amendment protects the right to speak anonymously. Yet difficult questions arise when litigants attempt to unmask anonymous Internet users in order to assert legal claims based on their online activities.

Invoking the Founders' pseudonymous political advocacy in *The Federalist Papers*, the U.S. Supreme Court in *McIntyre v. Ohio Elections Commission* (1995) recognized that "an author's decision to remain anonymous ... is an aspect of the freedom of speech protected by the First Amendment." The Internet provides merely the latest platform for anonymous speech, and in *Reno v. ACLU* (1997) the Supreme Court squarely held that

online speech enjoys the same degree of First Amendment protection as do books, newspapers and other traditional media. In the Court's words, the Internet allows anyone with a modem to "become a town crier with a voice that resonates farther than it could from any soapbox."

Several tests have arisen, primarily in the context of "cyber-libel" claims — suits typically alleging that an anonymous online speaker defamed the plaintiff by making intemperate chat room or message board comments. The issues usually are teed up after the plaintiff files a defamation suit against "Doe" defendants, attempts to subpoena an Internet service provider, or ISP, like Yahoo! or AOL, and is met with a motion to quash by the anonymous speaker.

Courts considering such claims have recognized that the defendants' First Amendment rights to speak anonymously should not be easily forfeited as the result of the mere assertion of meritless or make-weight claims.

In an early decision, the Northern District of California held in *Columbia Insurance Co. v. Seescandy.com* (1999) that a party seeking to uncover the identity of an anonymous defendant must demonstrate that its claims are capable of withstanding a motion to dismiss. Even in that case, which involved trademark claims against a cyber-squatter rather than defamation claims, the court suggested that some evidentiary showing was required. Analogizing to the probable cause in criminal law, the court held the plaintiff must make "some showing that an act giving rise to civil liability actually occurred."

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Later decisions in the libel context produced tests more explicitly protective of anonymous speakers. *Dendrite International v. Doe* (2001), a widely-followed decision by a New Jersey appellate court, denied a request by the corporate plaintiff to discover the identities of anonymous individuals who allegedly had posted defamatory comments on a message board. To obtain disclosure, the court required the plaintiff to provide reasonable notice to the anonymous speakers of the subpoena, set forth the exact statements made by each speaker, and present sufficient evidence to support each element of its claims on a prima facie basis. Even then, *Dendrite* held that the judge must weigh the defendants' First Amendment right of anonymous speech "against the strength of the prima facie case presented and the necessity for the disclosure." The Northern District embraced a modified version of the *Dendrite* test in 2005 in *Highfields Capital Management v. Doe*.

The Delaware Supreme Court adopted

a streamlined version of *Dendrite* in its 2005 *Doe v. Cahill* decision, a case that involved libel claims asserted by a city council member against an anonymous online critic. The court retained two of *Dendrite's* four requirements — that the plaintiff make reasonable efforts to notify the anonymous defendant and that the plaintiff make a prima facie evidentiary showing on each element of its claims, a test the court called the "summary judgment standard."

In *Krinsky v. Doe* (2008), the California Court of Appeal surveyed the various tests adopted by federal and state courts and similarly concluded that plaintiffs must make a prima facie evidentiary showing in support of the elements of their libel claims in order to overcome a defendant's motion to quash a subpoena aimed at discovering his identity. The court essentially adopted the *Cahill* test,

while eschewing its "summary judgment" and "motion to dismiss" terminology.

The U.S. 9th Circuit Court of Appeals appeared to buck this emerging trend in a 2011 decision, *In re Anonymous Online Speakers*, which suggested that those who engage anonymously in "commercial speech" are entitled to less constitutional protection than those who engage anonymously in political speech and therefore should not get the benefit of the high bar to disclosure imposed by *Cahill* and *Dendrite*. The panel initially held that the speech in question — criticism of a company's business practices — constituted "commercial speech." In an amended opinion, the panel reached the same result without making any determination whether the speech in question was commercial.

The defamation action arose from what the court described as an alleged "Internet smear campaign" by a business competitor orchestrated via anonymous postings and videos that disparaged the plaintiff, a multilevel marketing company (and suc-

cessor of Amway Corp.). The district court had applied the *Cahill* test, which the 9th Circuit described inaccurately as the “most exacting” of the extant tests, yet nonetheless ordered the defendant to disclose the identities of three non-party anonymous speakers.

Both sides petitioned for mandamus and the court denied both petitions, citing the limited and “extraordinary” nature of mandamus relief and the deferential “plain error” standard of review. Far from endorsing *Cahill*, however, the 9th Circuit went out of its way to opine that “*Cahill*’s bar extends too far” in the context of the non-political speech at issue in the case.

In cases involving claims of copyright infringement online, the courts have developed similar but less-stringent tests and generally have declined to quash subpoenas directed to ISPs that seek the identities of anonymous individuals, finding that the alleged infringers do not have significant free speech or privacy interests.

In an influential 2004 decision, the Southern District of New York articulated a five-factor test for balancing the privacy concerns of anonymous users with the discovery needs of plaintiffs asserting copyright claims. In *Sony Music Entertainment v. Does 1-40*, then-district Judge Denny Chin ruled that the party seeking discovery must make a “concrete showing of a prima facie claim,” be specific in its discovery requests, show an absence of alternative means to obtain the information,

and show that the subpoenaed information is “central” to the party’s claim. The court also must weigh the defendant’s expectation of privacy, which Judge Chin found to be minimal in the case of online file-sharing.

The U.S. 2nd Circuit Court of Appeals adopted this approach in 2010 in *Arista Records v. Doe* — the only federal appellate decision to date that has balanced the right to obtain discovery in support of a copyright infringement claim against the constitutional right to engage in anonymous speech online. The *Arista* court phrased its holding broadly — describing what in essence is a motion-to-dismiss test as “an appropriate general standard for determining whether a motion to quash, to preserve the objecting party’s anonymity, should be granted.” The *Arista/Sony Music* test subsequently has been applied by district courts in the D.C., 1st, 3rd, 4th, 6th, 7th, 9th, and 10th Circuits.

Just last month, a Pennsylvania federal judge denied motions to quash subpoenas filed by two anonymous Internet users in *Raw Films v. Does 1-15* (E.D. Pa. 2012). The defendants were among 15 “Doe” defendants who allegedly used the BitTorrent peer-to-peer file-sharing protocol to download and distribute a copy of one of the plaintiff’s adult films. Citing the 9th Circuit’s decision in *Anonymous Online Speakers*, the judge concluded that the *Cahill* high-burden test was inappropriate because *Cahill* “involved a different type

of claim and, more importantly, a different kind of speech” — namely, a libel claim that threatened to chill political speech about an elected official. Instead, the court adopted the *Arista/Sony Music* standard. That test, the judge held, “strikes the appropriate balance between the limited protection afforded to speech that constitutes copyright infringement and the need for the plaintiff to serve a defendant with process in order to advance non-frivolous claims of infringement.”

These recent decisions indicate that while courts are likely to continue applying the speech-protective, high-burden tests articulated in *Dendrite*, *Cahill* and *Krinsky* in cases that involve defamation claims (or similar claims based on non-commercial speech), courts are likely to be far less solicitous in protecting the identities of individuals who use the Internet to infringe intellectual property rights, reveal trade secrets, or engage in other conduct outside the core protections of the First Amendment.



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